

Juliet → Rebecca



EBBIN MOSER-SKAGGS LLP
environmental and natural resources law and strategy

February 9, 2015

VIA U.S. MAIL

Jane Hicks, Regulatory Division Chief
U.S. Army Corps of Engineers
1455 Market Street, 16th Floor
San Francisco, CA 94103

Re: Newark Illegal Dumping (File No. 2007-400075S)

Dear Ms. Hicks:

This letter responds to your letter of January 28, 2015, addressed to my client Tim Steele of the Sobrato Organization, regarding my letter to you of September 10, 2014 informing your office of illegal dumping of fill material into jurisdictional Waters of the United States on property in the City of Newark owned by the Sobrato Organization and Newark Partners and commonly referred to as "Area 4." Your letter erroneously and unjustifiably orders the Sobrato Organization to implement extensive corrective measures for violations which it did not commit and for which it is not liable.

The relevant facts are as follows:

- On the afternoon of September 8, 2014, Mr. Steele discovered that the lock on the property access road gate had been cut, the gate was open, substantial amounts of dirt had been deposited and spread on the site, and five dump trucks were in the process of dumping additional dirt. Mr. Steele immediately contacted the City of Newark, and Newark police responded within 15 minutes and began interviewing the dump truck drivers. Mr. Steele subsequently spoke with an individual claiming to be in charge of this dirt dumping operation, who asserted he had the landowner's permission. Mr. Steele then confirmed that none of the fee title owners, or anyone associated with the Sobrato Organization or Newark Partners, ever provided any such permission.
- On September 9, 2014, my client and its wetlands consultant (Mr. Pat Boursier of H.T. Harvey & Associates) began an investigation to determine the amount and extent of the illegal dumping. The consultant had previously delineated all aquatic features on the property (in preparation for eventual applications to develop the property), and the Army Corps of Engineers previously issued a final Jurisdictional Determination ("JD") identifying in detail all Waters of the United States on the property based on that delineation. The consultant determined that the illegal dumping perpetrator did place fill material into some jurisdictional Waters of the United States.

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- As of September 9, 2014, access to the property had again been secured and locked, and additional illegal dumping had stopped.
- On September 10, 2014 I sent your office a letter by fax and U.S. Mail providing a courtesy notification of all of the above information. The letter invited you to contact either myself, or Mr. Steele, for further information. Your office did not respond to my notification letter.
- On September 29, 2014 I joined Mr. Steele in meeting with representatives of the Newark Police Department, the Alameda County District Attorney's Office (Ms. Cristina Harbison), and the U.S. Environmental Protection Agency's Criminal Investigation Division (Ms. Wendy Su). Those agencies indicated that they were coordinating the investigation of the illegal dumping activity and the identified perpetrator, and that one or more of them would likely be in touch with your office shortly. We understand that one or more of these representatives did subsequently meet with your office about this matter.
- On September 30, 2014 I sent an email to your office to provide additional information based on my client's further investigation. In that email I informed you that we had identified the perpetrator, determined that he was responsible for nearly 700 dump truck loads of dirt having been illegally dumped on approximately 22 acres of the property on which he had trespassed, and also determined that these 22 acres included over 13 acres of jurisdictional Waters of the United States as determined by your JD. The email also informed you of the September 29 meeting referenced above.
- On November 4, 2014, Katerina Galacatos of your office conducted a site visit, accompanied by my client's wetland consultant.
- The District Attorney investigator, Ms. Harbison, has been in periodic communication with my client since our September 29 meeting, including less than two weeks ago. The investigating agencies identified above have been clear that the dumping was conducted by a known third party who was illegally trespassing on my client's property, and that my clients are in no way culpable. As noted above, the perpetrator was quickly identified in September, and indeed has a history of similar illegal acts. Ms. Harbison reports that her office is vigorously pursuing this matter through the California Attorney General's office, but that she is unable to provide us with any detailed information.
- My client continues to cooperate fully with all involved agencies in their investigation. In deference to their investigation, and at the specific request of the District Attorney's office, my client has agreed to not pursue any civil action against the perpetrator at this time.

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Your January 28, 2015 letter orders my client, purportedly pursuant to 33 CFR Section 326.3(d)(1), to "remove all unauthorized fill that has been placed in jurisdictional wetland and other waters and return those areas to the original pre-fill grade/elevation," to dispose of that fill material "at an approved upland location," to obtain the Corps' approval of that upland location in advance, and to complete this work between June 1 and September 30, 2015.

Section 326.3(d)(1) directs the Corps to issue a corrective measures order "to the parties responsible for the violation." My client is in no way responsible for this violation. Rather, my client voluntarily provided your office with an immediate, good faith notification of a significant incident within your jurisdiction, followed up that notification by providing you with additional information, and has since cooperated completely with all investigating agencies who have verified that my clients are not in any way responsible for the illegal acts which occurred. Accordingly, your order should instead be directed to the known and identified perpetrator.

On a separate matter, my client has also been working with the Corps, as well as with the City of Newark and other entities, on plans for development on a portion of the Area 4 property. In connection with that, my client has recently submitted a Nationwide Permit notification package to your office, through its wetland consultant. We look forward to meeting with you soon to discuss that project.

Should you have any questions or desire any additional information, please contact me at your convenience. I can be reached at 415-362-0634 and at dmoser@emslp.com.

Very truly yours,



David E. Moser

cc: US Attorney, San Francisco, CA
US EPA, San Francisco, CA (Attn. David Wampler and Wendy Su)
CA RWQCB
Alameda County District Attorney (Attn. Cristina Harbison)
Newark Police Department
Newark City Manager
Tim Steele, Sobrato Organization
Pat Boursier, H.T. Harvey & Assoc.